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Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

No. 94-175

In The

Supreme Court of the United States

October Term, 1994

KEN BIEGELEISEN, M.D., pro se,

Petitioner,

vs.

JULIUS JACOBSON, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the decision of the New York State Court of Appeals, denying Petitioner leave to appeal the New York Appellate Division's affirmation of the trial court's grant of summary judgment against the Petitioner's defamation action based on the doctrine of absolute witness immunity in conflict with prior decisions of New York State's highest appellate tribunal, thus depriving the Petitioner Due Process?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of the Case 2

Reasons for Denying the Writ 4

I. The New York State Court of Appeals decision denying Petitioner's leave to appeal the New York Appellate Division's affirmation of the trial court's grant of summary judgment against the Petitioner's defamation action based on the doctrine of absolute witness immunity is not in conflict with prior decisions of the Appellate Courts of New York State 4

II. The New York State decisions on testimonial immunity are in accord with the decisions of the U.S. Circuit Courts of Appeals and the United States Supreme Court 6

III. Determination by the Appellate Court of New York State that the testimony of the Respondent at trial was relevant to the issues and subject matter on trial was a determination of FACT and does not warrant review by this Court 7

Conclusion 8

Appendix A – Decision of the New York Supreme Court Appellate Division for the First Department dated February 1, 1994 ..... 1a

TABLE OF AUTHORITIES

Page

CASES CITED:

Briscoe v. Lahue, 406 U.S. 325 (1983) 6, 7

Imbler v. Packtman, 424 U.S. 409 (1976) 6, 7

Marsh v. Ellsworth, 50 N.Y. 309 (1872) 5

Martirano v. Frost, 25 N.Y.2d 505 (1969) 5

Star v. Simonelli, 76 A.D.2d 861 (N.Y. App. Div., Second Dept. 1980) 5

Tolisano v. Texon, 75 N.Y.2d 732 (1989) 5

United States v. Johnson, 268 U.S. 220 (1925) 7

White v. Carroll, 42 N.Y. 161 (1870) 4, 5, 6

Wiser v. Koval, 50 A.D.2d 523 (N.Y. App. Div., First Dept. 1975) 5

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Julius Jacobson, M.D., respectfully submits this brief in opposition to petitioner's request that a Writ of Certiorari issue to review the decision and judgment of the New York State Court of Appeals, filed April 28, 1994, which denied leave to appeal a decision of the Appellate Division, First Department of the New York State Supreme Court, filed November 9, 1993.

OPINIONS BELOW

The decision of the New York State Supreme Court is reproduced in Appendix to the Petition.

The decision of the New York State Appellate Division First Department is reproduced in Appendix to the Petition #1.

The decision of the New York State Appellate Division First Department denying leave to Appeal to the New York Court of Appeals is reproduced in Respondent's Appendix 1a.

The decision of the New York State Court of Appeals denying leave to appeal is reproduced in Petition Appendix #3.

STATEMENT OF THE CASE

The Petitioner erroneously labels the issue as one of "testamentary immunity" when in fact the subject matter is testimonial immunity.

The Petitioner alleges in his Brief that he was convicted of a "crime" by the jury's monetary award in the medical malpractice suit (Page 10). This is a total misstatement of fact. There are no criminal implications in this entire matter.

The Petitioner, a medical doctor, was a defendant in a medical malpractice suit in the State of New York, against whom a jury awarded money damages.

The Respondent, a medical doctor, gave expert medical testimony during that trial, on behalf of the allegedly injured patient, during which he testified that the medical procedure used by the Petitioner on the patient, amounted to "quackery" and the Petitioner should be "put out of business."

The Petitioner then brought an action for defamation against the Respondent, wherein the only basis asserted for the defamation was the trial testimony.

The Trial Court granted Summary Judgment in favor of the Respondent, based *inter alia,* on the principle that "an expert witness at trial, is immunized from a suit for defamation based on his trial testimony, and that nothing in the material complained of was irrelevant to the issue being tried, or the subject matter of the petitioner's medical expertise." (See Petition Appendix #1).

The Appellate Division First Department of the New York Supreme Court denied the Petitioner's appeal, stating that "the statements defendant made during his testimony as an expert witness in the medical malpractice action . . . cannot be the subject of a defamation action unless they constituted falsehoods so obviously irrelevant as to warrant an inference of express malice . . . such is not here the case." (Petition Appendix #2).

The Petitioner sought permission, pro se, from the Appellate Division First Department of the New York Supreme Court for leave to appeal to the New York State Court of Appeals and was denied and ordered to pay $100.00 costs. (Respondent Appendix #1A).

Petitioner then sought permission from the State of New York Court of Appeals for leave to appeal and was denied on April 28, 1994. (Petition Appendix #3).

The Petitioner does not show any compliance with the considerations governing review on Writ of Certiorari (Rules of the Supreme Court #10) in that no Federal question of law, or conflict of laws is involved. Nor is a

question of departure from the usual course of judicial proceedings truly at issue.

REASONS FOR DENYING THE WRIT

I

THE NEW YORK STATE COURT OF APPEALS DECISION DENYING PETITIONER'S LEAVE TO APPEAL THE NEW YORK APPELLATE DIVISION'S AFFIRMATION OF THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AGAINST THE PETITIONER'S DEFAMATION ACTION BASED ON THE DOCTRINE OF ABSOLUTE WITNESS IMMUNITY IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE APPELLATE COURTS OF NEW YORK STATE.

The petition in this proceeding fails to satisfy any of the criteria determining whether to grant a Writ of Certiorari. The Courts below properly adhered to the prior decisions of New York State's highest appellate tribunal, The Court of Appeals, and they applied the law in a manner that is fully consistent with the undisputed facts and the decisions rendered by other Courts that have addressed similar issues.

Petitioner mistakenly cites *White v. Carroll*, 42 N.Y. 161 (1870), as being directly in conflict with the decision in his case by the New York State Court of Appeals.

The pro se Petitioner is probably struck by the coincidental similarity of facts in both cases; in that they both arose from the remarks made by a medical doctor concerning a competing doctor, who practices a medical technique directly contrary to the testifying doctor's personal

beliefs and practice. In that matter during testimony Dr. Carroll described Dr. White as a "quack" and Dr. White sued him for defamation, as is similar to the facts in this case. However, that is where the similarity ends.

In the *White* case, the subject matter of the underlying trial was the testamentary capacity of a deceased patient of both doctors. In the case before this Court, the subject matter of the underlying trial was whether the medical procedures used by the Petitioner were medically acceptable and whether the Petitioner had committed the civil tort of malpractice against the complaining patient. The Respondent herein was testifying as a medial expert witness, on behalf of the complaining patient, on the subject then in issue, i.e., the medical competency of the Petitioner himself. The New York Appellate Division found that Dr. Jacobson's opinion although, "delivered in a blunt and degrading manner" was totally relevant to the subject matter, (Petition Appendix #2 at page 45) and thus he enjoyed the absolute privilege of the protective shield from any legal ramifications of what he said during testimony.

The prevailing rule of law in New York State regarding remarks made during testimony has been consistent. A witness is immunized from a suit for defamation, provided his testimony is relevant to the issue on trial. *See Tolisano v. Texon*, 75 N.Y.2d 732 (1989); *Martirano v. Frost*, 25 N.Y.2d 505 (1969); *Marsh v. Ellsworth*, 50 N.Y. 312 (1872); *White v. Carroll*, 42 N.Y. 161 (1870); *Star v. Simonelli*, 76 A.D.2d 861 (N.Y. App. Div., Second Dept. 1980); *Wiser v. Koval*, 50 A.D.2d 523 (N.Y. App. Div., First Dept. 1975).

II

THE NEW YORK STATE DECISIONS ON TESTIMONIAL IMMUNITY ARE IN ACCORD WITH THE DECISIONS OF THE U.S. CIRCUIT COURTS OF APPEALS AND THE UNITED STATES SUPREME COURT.

The United States Supreme Court has reviewed the subject of absolute witness immunity on many occasions for particular refinements of the general rule, but has never waivered from support of the general principle. *See Briscoe v. Lahue,* 460 U.S 325 (1983). *See also Imbler v. Pachtman,* 424 U.S. 409 (1976).

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English Common Law. *Briscoe,* 460 U.S. at 331. The American rule adopted the English Common Law rule of privilege for witnesses in judicial proceedings but added a requirement that the statements be relevant to the judicial proceeding. Once this threshold has been met the witness enjoys an absolute privilege. *See Briscoe* at 331.

In discussing *White v. Carroll,* the Supreme Court in *Briscoe v. Lahue* interpreted the requirement of "good faith" on the part of the witness as being established as a matter of law if the statements were pertinent and material to the judicial proceeding and given in response to questions. *Briscoe,* at 332, n.11.

Public policy supports absolute immunity from damages liability for witnesses based on their testimony at judicial proceeding. The Court in *Briscoe* cautioned that such immunity is necessary to avoid self censorship of

witnesses in that witnesses would be reluctant to testify or testimony may be distorted by fear of subsequent liability, *Briscoe*, 460 U.S. at 333; *see also Imbler*, 424 U.S. at 427, n.23 ("In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding").

There are no facts in this case that warrant a review of this well established policy by this Court.

III

DETERMINATION BY THE APPELLATE COURT OF NEW YORK STATE THAT THE TESTIMONY OF THE RESPONDENT AT TRIAL WAS RELEVANT TO THE ISSUES AND SUBJECT MATTER ON TRIAL WAS A DETERMINATION OF FACT AND DOES NOT WARRANT REVIEW BY THIS COURT.

The relevancy of the Respondent's testimony in the malpractice action is self evident and The Appellate Division found it to be completely so. Although the Court found the testimony to be "blunt and degrading" nonetheless it found the statements were primarily expressions of opinion not of facts and in any event were directly relevant to the defendant's opinion concerning the status of sclerotherapy as an accepted medical practice for cosmetic surgery. (Decision of the Appellate Division of the State of New York – Petition Appendix #2 at page 45 and 46).

It has long been the rule that this Court will not grant certiorari to review the factual determinations made by the lower Courts. *See United States v. Johnson*, 268 U.S.

220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") Nothing in this case suggests that a departure from this well conceived rule is appropriate.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a Writ of Certiorari should be denied.

Dated: August 17, 1994

Respectfully submitted,

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APPENDIX – DECISION OF THE NEW YORK SUPREME COURT APPELLATE DIVISION FOR THE FIRST DEPARTMENT DATED FEBRUARY 1, 1994.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 1, 1994

Present –
Hon. Ernst H. Rosenberg Justice Presiding
Richard W. Wallach
Theodore R. Kupferman
Sidney H. Asch
----------x Justices.

Ken Biegeleisen, M.D.

Plaintiff - Appellant,

-against- M-6830

Julius Jacobson, M.D.,

Defendant - Respondent.
----------x

The above-named plaintiff-appellant having moved for reargument of the decision and order of this Court entered on November 9, 1993 (Appeal No. 50170), Or, alternatively, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is denied with $100 costs.

ENTER:

Clerk.